IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RICK E. WELCH,
Petitioner.

No. 2 CA-CR 2017-0142-PR
Filed July 14, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20111934001
The Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Offices of Lawrence Y. Gee, PLLC, Tucson
By Lawrence Y. Gee
Counsel for Petitioner

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Kelly[1] concurred.

E S P I N O S A, Judge:

¶1 Rick Welch seeks review of the trial court's orders denying his post-conviction request for discovery and his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those orders unless the court clearly abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015) ("We review a trial court's denial of post-conviction relief for abuse of discretion."); *State v. Moreno*, 153 Ariz. 67, 70, 734 P.2d 609, 612 (App. 1986) (post-conviction discovery ruling reviewed for abuse of discretion). Welch has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Welch was convicted of five counts of sexual exploitation of a minor under the age of fifteen based on the discovery of child pornography on computer equipment and data storage devices found in his home. *State v. Welch*, 236 Ariz. 308, ¶¶ 2-3, 340 P.3d 387, 389 (App. 2014). The trial court sentenced him to consecutive, ten-year prison terms for each offense. *Id.* ¶ 3. We affirmed his convictions and sentences on appeal. *Id.* ¶ 36.

¶3 Welch sought post-conviction relief, arguing his trial counsel had been ineffective in failing to: (1) retain and call as a witness a computer expert to conduct a forensic examination of his computer and provide testimony contradicting the state's witnesses; (2) investigate his business records to develop his alibi and third-

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

party culpability defenses; (3) call him and a computer expert as witnesses at the hearing for his motion to suppress; (4) adequately prepare him to testify at trial; and (5) object to a statement by the prosecutor during closing purportedly misstating the evidence. He additionally raised a claim of actual innocence pursuant to Rule 32.1(h). The trial court summarily rejected those claims.

¶4 Welch then asked the trial court to permit discovery pending his filing of an amended Rule 32 petition. Specifically, he requested permission to conduct a forensic examination of his computer and attempt to locate business records. The court denied that motion after a hearing, concluding Welch's proposed discovery would not "lead to all that much helpful information." This petition for review followed.

¶5 On review, Welch reasserts his claim that counsel was ineffective for failing to consult with and present the testimony of a computer expert.[2] He argues he is "entitled to a new trial on this issue" or "at a minimum," an evidentiary hearing. A defendant is entitled to a hearing only if he presents a colorable claim for relief, that is, "he has alleged facts which, if true, would probably have changed the verdict or sentence." *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11, 368 P.3d 925, 927-28 (2016) (emphasis omitted). "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *accord State v. Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d 61, 64 (2016); *see also Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Prejudice exists if the defendant can "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d at 64, *quoting Hinton v. Alabama*, ___ U.S. ___, ___, 134 S. Ct. 1081, 1089 (2014). If a defendant makes an insufficient showing

[2]Welch does not argue on review that the trial court erred in rejecting his other claims of ineffective assistance or his claim of actual innocence. Thus, we do not address those claims.

on either deficient performance or prejudice, the court need not address the other part. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶6 Welch argues at length that counsel fell below prevailing professional norms by failing to consult with an expert. But we need not address that issue. In addition to determining that counsel had made a strategic decision to forgo consulting with an expert, the court further concluded Welch had not demonstrated prejudice because nothing in the expert's affidavit "provides an alternative means for the images to be copied from [Welch]'s main computer to individual disks and retained there." Thus, the court reasoned, the affidavit does "nothing to refute the actual possession of the images or the transfer of the images, or the knowledge thereof." Although Welch broadly asserts the expert's potential testimony might have altered the jury's verdicts, he does not identify any error in the court's reasoning. Thus, he has not established the court erred in rejecting this claim. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (insufficient argument waives claim on review).

¶7 Welch next argues the trial court erred in rejecting his request for discovery in preparation for filing an amended petition for post-conviction relief, made after the trial court had denied his petition for post-conviction relief.[3] He argues that, pursuant to *Canion v. Cole*, 210 Ariz. 598, 115 P.3d 1261 (2005), he was not entitled to seek discovery until he had filed a petition for post-

[3]The Ninth Circuit Court of Appeals has observed that no Arizona case has interpreted Rule 32.6(d) to bar the filing of an amended petition for post-conviction relief after the initial proceeding has been dismissed. *Scott v. Schriro*, 567 F.3d 573, 581 (9th Cir. 2009). We assume, without deciding, that a trial court has authority to grant a defendant's request to file an amended petition even when the request is made only after the initial petition has been dismissed. *See* Ariz. R. Crim. P. 32.6(d) ("After the filing of a post-conviction relief petition, no amendments shall be permitted except by leave of court upon a showing of good cause.").

conviction relief and he is entitled to discovery of any relevant evidence without a showing of good cause. Thus, he concludes, because he requested discovery of relevant evidence, the court erred in rejecting that request.

¶8 In *Canion*, our supreme court determined that a trial court has inherent authority to grant discovery requests in post-conviction proceedings. *Id.* ¶ 10. The court further stated that a defendant "must file" a petition for post-conviction relief "to provide context" for such a request. *Id.* The court determined that, upon receiving any requested discovery, the petitioner could then seek to amend the pending petition pursuant to Rule 32.6(d). *Id.* ¶ 16.

¶9 Welch is mistaken that he is not required to show good cause for discovery. In *Canion*, the supreme court stated unambiguously "that trial judges have inherent authority to grant discovery requests in [post-conviction] proceedings *upon a showing of good cause*." *Id.* ¶ 10 (emphasis added). Welch has not established such cause here. He provides no explanation for his failure to seek discovery upon filing his petition for post-conviction relief instead of waiting over two weeks after the trial court summarily dismissed it. Nor does he suggest the discovery would permit him to raise any claims he had not already asserted in his initial petition. Instead, his discovery request sought additional evidence to relitigate claims the court had already rejected. Finally, he has not identified any error in the court's conclusion that the proposed discovery was unlikely to be useful, particularly given the court's determination that he had not shown the expert's testimony would have altered the jury's verdicts.

¶10 Although we grant review, relief is denied.